> and miscellaneous physical property, as of July 31, 1934. In view of the conservative relation of the applicant's debt to probable property valuation, and its high earnings previous to the present depression, we are of the opinion that a financial reorganization of the applicant is not required in the public interest at this time."

There is no finding of the Commission in its plan of reorganization from which it can be determined that what was a "conservative relation of the applicant's debt to probable property valuation," as of September 29, 1934, has now changed so that only $423,774,309 is the value of capitalizable assets.

As of January 1, 1938, the Commission finds Debtor's total principal amount of debt securities to be $370,361,965 (Tr. 3520), and adding to this the preferred stock of $22,395,000 and the common stock of $158,440,300, gives a grand total of $551,197,265 as the capitalization as of that date. The rate-making value as of December 31, 1935, is $676,793,588 (Tr. 3509) as compared with $642,-736,392 on December 31, 1931 (see 202 I. C. C. 271, 274), an increase in the amount of $34,057,196. Debt increased from $347,184,100 on July 31, 1934 to $370,361,965 on December 31, 1938, an increase of $23,177,865. The increase in rate-making value of $34,057,196 in the same period is $10,879,331 greater than the increase in debt. Certainly, if the relation of debt to property valuation was conservative on July 31, 1934 (the Commission so found on September 29, 1934), and the property valuation has increased by $10,879,331 more than the increase in debt during the period ending December 31, 1938, the relation of debt to property valuation is still conservative.

In view of the Commission's finding in October, 1934, that the North Western was then reasonably capitalized,

and its finding in September, 1934, that debt was reasonably related to valuation of property, it is clear that the Commission is arbitrary in finding that capitalization should not exceed $423,774,309 at date of reorganization.

In a very able article entitled "Federal Regulation of Railway Management and Finance," by Kenneth F. Burgess, Esq., (counsel herein for the insurance companies), 37 Harvard Law Review, 705, at page 717, the author discusses the principles of capitalization as applied by the Commission in regulation of security issues. At the time the article was written, the Transportation Act, 1920, 41 Stat. at L. 456, had been in effect a few years and the author discussed capitalization, saying at page 728-9:

> "* * * The requirement that 'necessary investments in nonrevenue-producing property' be uncapitalized, and that capitalization should only be permitted in respect to assets 'intended for continuing *productive use* in the service of transportation,' may well be rejected by the courts, for a railroad corporation should be permitted to earn a return upon all property 'necessary' to its public service, *and to capitalize it without regard to its revenue-producing qualities.*" (Our italics.)

At the end of the above quotation is a footnote, which reads as follows:

> "Section 19a of the Interstate Commerce Act requires the Commission to ascertain the value of 'all the property owned or used by every common carrier' subject to the Act. See 37 Stat. at L. 701. There seems to be nothing in the Act requiring a distinction between productive and unproductive railway property, and no test is given as a basis for any differentiation. The Commission itself has steadily recognized the propriety of assigning unproductive investments in railroad property to 'Investment in Road and Equipment'. For example, primary account No. 39 under 'Road', in the Commission's classification of July 1, 1914, is entitled "Assess-

ments for Public Improvements'. These are grading, sewering, paving, etc., and are assigned to Investment in Road, while the carriers' proportion of the cost of maintaining these public improvements must be included in operating expenses. Similarly the original cost of track elevation to conform to state or municipal requirements, viaducts, fences, crossing gates and signs, cattle-guards, and passenger depot facilities, regardless of their productive character, are required to be assigned to the investment account. Section I, par. 21, authorizes the Commission to require a carrier to provide '*safe* and adequate facilities' for performing car service; and Section 26 authorizes it to require the installation of automatic train control devices and other safety devices. The 'Ash Pan Act', the 'Boiler Inspection Act', and the 'Safety Appliance Acts' also impose certain capital expenditures, which might be classed as 'unproductive', upon the carriers in the public interest. To provide for these various improvements in the future would seem to be a 'lawful object' for which securities might be issued under Section 20a. A rule by which future investments in such improvements could be capitalized, but investments already made can not, is not entirely logical."

We think this Court may well endorse the view of Mr. Burgess at that time, when he expressed his own views as a student of the law, that a railroad corporation should be permitted to capitalize all property necessary to its public service "without regard to its revenue-producing qualities."

The Commission's maximum permissive capitalization exceeds by $26,200,000 the capitalization to be outstanding as of the date of reorganization. All of the creditors have been taken care of in the order of their priority, except the holders of convertible bonds, for which $45,860,390 of common stock is authorized, stated at $100 per share. The principal claim of the convertible bondholders as stated in the Commission report (Tr. 3677), is $72,-

335,000 as of December 31, 1938, with unpaid interest claimed of $14,316,302 as of said date, a total claim of $86,651,302. The common stock allotted to the convertibles in the sum of $45,860,390 falls short of the principal amount of convertible debenture claim by $26,474,610 and of the total of principal and unpaid interest by $40,790,912.

Applying $26,200,000 of the capitalization reserved for rehabilitation and improvement, to the convertible debenture principal amount unrecognized in the reorganization of $26,474,610, leaves $274,610 for which no allocation is possible to be made under the permissible capitalization, or if applied against the principal and interest in the amount of $40,790,912, leaves $14,590,912 for which no allocation is permissible under the Commission's finding.

The Commission's plan of reorganization is proposed to be effective as of January 1, 1939, and in its computation of interest for which securities are to be issued as of that date, the accumulated interest as of that date is $60,008,639. (Tr. 3677) If the plan of reorganization be made effective as of the date of the "bankruptcy," June 28, 1935, only $4,855,637 of unpaid interest shown on page 3671 of the record would have accrued, and therefore the reorganized company would require only $384,-963,420 of capitalization to liquidate all of the claims of the creditors, both principal and interest, leaving $65,010,-889, the remainder of permissive capitalization under the plan of reorganization, available for the preferred and common stockholders as of that date. (See Debtor's District Court Ex. 33.)

Objection No. 2. Value of equity of Debtor's preferred and common stock.

Objection No. 2 challenges the finding of the Commission that there is no value in the equity of the preferred and common stock. The opinion of the District Court

overrules this objection (Tr. 5031), and the Circuit Court of Appeals affirmed that finding. (Tr. 5805)

Changed conditions, errors in maximum capitalization, error in the treatment of the claim of the Reconstruction Finance Corporation, and error in determining the effective date of the plan undoubtedly require the return of the proceedings to the Commission for further consideration at which time the Commission should determine anew the question of whether equity of the stock has value. In other words, if the plan of reorganization is sent back to the Commission because of its failure properly to fix the maximum capitalization, or to require payment of the claim of the Reconstruction Finance Corporation in cash, thus releasing some $135,000,000 of securities for other creditors and stockholders or to make the plan effective as of June 28, 1935, there will be ample securities within the maximum limits of capitalization to provide for all the creditors in order of priority and leave a substantial equity to the preferred and common stockholders.

Objections Nos. 6, 7, and 8 challenge the plan of reorganization in so far as it deals with the claim of the Reconstruction Finance Corporation. (Tr. 4002-8)

Objection No. 6. The treatment accorded to the Reconstruction Finance Corporation is unfair and inequitable.

(a) The amount of securities allotted to Reconstruction Finance Corporation is excessive.

The principal of the claim of the Reconstruction Finance Corporation as of June 28, 1935, is $42,250,133. (Tr. 3627) Computed at 4 per cent, as at December 31, 1938, the unpaid interest amounted to $4,781,867. If computed at the rate of 5 per cent and 6 per cent as stated in the notes, as of said date the unpaid interest would

amount to $6,934,772, the difference in interest charges being $2,152,905. To secure the payment of those notes, securities of the Chicago and North Western and of the Omaha were pledged in an aggregate sum of $95,099,000, as of December 31, 1937 (Tr. 3525), as were other securities in the form of stocks and bonds, in the sum of $6,714,800 (Tr. 3525), a total of all collateral of $101,813,800.

In the following tables we set forth the items of securities to be received by the Reconstruction Finance Corporation under the plan of reorganization as of January 1, 1939, in settlement of its claim for principal amount of notes, of $42,250,133 and accrued interest of $6,934,772, in accordance with the rates of 5 per cent and 6 per cent as stated in the notes:

Securities of reorganization company allocated with full ownership in R. F. C. (Tr. 3677):		
Fifteen-year secured notes	$25,000,000	
First and general mortgage bonds, Series A	7,783,180	
Second mortgage convertible income bonds, Series A, 4½ per cent	12,114,530	
Preferred stock, Series A, 5 per cent	15,543,462	
Common stock, no par (stated at $100 a share)	23,259,836	
Total		$83,701,008
Securities given unconditionally to R. F. C. (Tr. 3701):		
Union Pacific Railway Company preferred stock, par value	$ 2,085,000	
New York Central Railroad Company 4 per cent bonds, 1998	64,000	
New York Central & Hudson River Railroad Company 4½ per cent bonds, 2013	100,000	
Total		2,249,000
Securities given as collateral to secure $25,000,000 of 15-year notes (Tr. 3701):		
Chicago and North Western Railway Company equipment trust 4½ per cent, Series Y certificates	$ 104,000	
Chicago, St. Paul, Minneapolis & Omaha Railway Company first mortgage, Series A, 5 per cent, due 2000	45,186,000	
Chicago, St. Paul, Minneapolis & Omaha Railway Company equipment trust 4¾ per cent Series I certificates	128,000	
Indiana Harbor Belt Railroad Company capital stock	1,520,000	
Sioux City Bridge Company capital stock (with assignment of dividends for application in reduction of principal of debt before maturity)	945,800	
Superior Coal Company capital stock (with assignment of dividends for application in reduction of principal of debt before maturity)	2,000,000	
Total		49,883,800
GRAND TOTAL		$135,833,808

If the securities given unconditionally to the Reconstruction Finance Corporation be applied in reduction of the principal of the note of $42,250,133, the principal amount of the debt would then be $40,001,133.

The annual earnings on notes, bonds, and preferred stock, only, of the reorganized company to be received by the Reconstruction Finance Corporation will be $2,633,654, which is the equivalent of 6.584 per cent on the principal amount of the debt, after application of the Union Pacific preferred stock and New York Central bonds unconditionally conveyed, and is equivalent to a return of 5.619 per cent on the principal of the notes so reduced, plus the accumulated interest at the rate named in the notes of $46,935,905. Moreover, when the dividend at 5 per cent on the new common stock allocated to the corporation is added to the foregoing, the total annual earnings from the securities would be $3,796,646, which is the equivalent of 9.49 per cent on the $40,001,133 and of 8.09 per cent on that amount plus the unpaid interest, as of December 31, 1938. After fifteen years the debt to the Reconstruction Finance Corporation will be reduced by the payment of the 15-year secured notes in the amount of $25,000,000, to $15,001,133, exclusive of interest, or $21,935,905, inclusive of interest. The earnings thereafter on bonds and preferred stock will be $1,633,654 annually, which is equivalent to a return of 10.89 per cent on the remaining debt, exclusive of interest, and 7.45 per cent on the remainder of debt, inclusive of interest.

The foregoing is not the entire story of advantage to the Reconstruction Finance Corporation, for it does not include the bonus arising from excess securities allocated to the corporation in the sum of $36,765,103. That sum is the difference between the principal amount of the indebtedness of the Reconstruction Finance Corporation and the total securities allocated to it. Distributing that bonus over the fifteen-year term of the notes produces an annual bonus of $2,451,000, which is equivalent to an annual yield of 5.2 per cent on the original indebtedness.

That additional return, added to the payments of interest and dividends on securities allocated to the corporation, gives it a total annual yield for the fifteen years of 13.3 per cent.

We now make a further analysis of the excessive character of the allocation to the corporation. For each $1,000 of original debt ($1,173 with accrued interest) remaining after reduction of the debt, by applying Union Pacific stock and New York Central bonds, the corporation will receive:

$ 625	in Notes
194	1st Mortgage
303	2nd Mortgage
388	Preferred Stock
580	Common Stock
$2,090	

For each $375 of original debt remaining after the $25,000,000 of 15-year notes are paid, the Reconstruction Finance Corporation will hold $1,465 of securities of the reorganized company, which is at the rate of $3,900 for each $1,000 of the original debt remaining unpaid after fifteen years.

Applying the Union Pacific stock and New York Central bonds leaves the principal amount of the debt at:	$40,001,133
To which should be added unpaid interest to December 31, 1938, of:	6,934,772
	$46,935,905

The Commission allocated new securities:

15-yr. Secured Notes	$25,000,000
1st Mortgage Bonds	7,783,180
2nd Mortgage Bonds	12,114,530
	$44,897,710

which would require only $2,038,195 of preferred stock to bring the amount of securities of the new company to the amount of the unpaid principal and interest of $46,935,905. The plan of reorganization, however, allotted a total of secured notes, bonds, and preferred and

common stock to the new company in the sum of $83,701,008, which is $36,765,103 more than the face value of its claim with interest. When the earnings of the system reach $17,250,000, they will be sufficient to cover all interest requirements and 5 per cent dividends on the preferred stock. That amount of earnings has already been reached. When the earnings reach $23,250,000, there will be sufficient to cover all interest charges and dividends on the preferred and common stock. For the calendar year 1942, after income and all other taxes, Debtor's system earnings were $28,121,321 (Appendix B to Second Motion Further to Supplement the Record). The total earnings on the notes, bonds, and on the preferred and common stock allotted to the Reconstruction Finance Corporation is $3,796,646, which is equivalent to a return of 8.1 per cent on the total amount of the corporation's claim on date of reorganization.

(b) Treatment of other creditors compared with Reconstruction Finance Corporation.

Five per cent notes held by the banks in the aggregate principal amount of $4,439,690, which matured in 1936, had collateral of the Chicago and North Western Railway Company in the aggregate par value of $16,108,000, and Union Pacific Railroad Company preferred stock of $2,085,000, a total collateral of $18,193,000. The Commission authorized the sale of the Union Pacific Railroad Company preferred stock now held by the banks, and the proceeds to be applied to the reduction of the debt. The total amount of the principal and unpaid interest on the bank loans aggregated $5,029,948, so that the Union Pacific stock was considered as equivalent to cash in the sum of $1,733,948. The Commission required that the new notes allotted to the banks should be secured by

collateral in the sum of $18,747,776, of which the first and general mortgage, Series A, bonds and new mortgage convertible, Series A, bonds constituted $7,422,676, and the new preferred and common stock constituted $11,325,100. It was further provided that such securities, if redeemed from pledge through the application of net income or the capital fund, should be cancelled, and no other securities issued on the basis of such redemption other than common stock to the extent of the principal amount of the notes. (Tr. 3608, 3649)

Contrast that treatment with the Reconstruction Finance Corporation loans where the Commission allocated outright to the corporation a total of new securities of $58,701,008 in exchange for collateral of the Debtor in the sum of $49,652,000. (Tr. 3677) No right to redeem the collateral in the sum of $49,883,800 was given, while such right of redemption was given to the reorganized company in the case of the collateral securing the notes given to the banks. (Tr. 3649-50) For each $375 of original debt to the Reconstruction Finance Corporation remaining after the $25,000,000 notes are paid, the corporation will hold $1,465 of new securities, which is at the rate of $3,900 for each $1,000 of original debt remaining unpaid after fifteen years.

Compare the above situation with that of the holders of a $1,000 secured 6½ per cent bond who receive (Tr. 3654):

$250	First Mortgage Bonds @ 4 per cent yield	$10.00
582	Second Mortgage Bonds @ 4½ per cent yield	26.19
537	Preferred Stock @ 5 per cent yield	26.85
51	Common Stock @ 5 per cent yield	2.55
$1420		$65.59

The annual earnings on the foregoing securities are the equivalent of 5.25 per cent on the face value of the 6½ per cent bonds, plus unpaid interest.

Consider also the situation of the holder of a 3½ per cent gold bond who receives (Tr. 3654):

$198	First Mortgage Bonds @ 4 per cent yield	$ 7.92
463	Second Mortgage Bonds @ 4½ per cent yield	20.84
427	Preferred Stock @ 5 per cent yield	21.35
40	Common Stock @ 5 per cent yield	2.00
$1128		$52.11

The annual earnings on these securities are at the rate of 4.62 per cent on the face value of the bond, plus accrued interest.

The banks will receive a 15-year secured note bearing 4 per cent interest for the face of their obligations.

Holders of Sioux City & Pacific bonds and Des Plaines Valley bonds will receive bonds in the face amount of their debt with a 4 per cent return.

The holders of a 5 per cent first and refunding bond will receive (Tr. 3654):

$154	First Mortgage Bonds @ 4 per cent yield	$ 6.16
233	Second Mortgage Bonds @ 4½ per cent yield	10.48
307	Preferred Stock @ 5 per cent yield	15.35
485	Common Stock @ 5 per cent yield	24.25
$1179		$56.24

These annual earnings are the equivalent of 4.8 per cent on the face amount of the bond, plus accrued interest.

Whether the plan be made effective January 1, 1939, or June 28, 1935, the amount which the Commission, under its plan, allocates to the Reconstruction Finance Corporation must shock the conscience of any court. Here is a corporation owned by the United States, organized to help, among others, financially embarrassed railroad corporations. Its aid is supposed to be given without profit. Instead of being an instrument of aid to the weak it becomes an instrument of destruction to prop-

erty values and a burden on the reorganized company. Section 77 requires, before the plan of reorganization can be approved, that the court must find that the provisions of the plan are fair and equitable, that such provisions do not discriminate unfairly in favor of any class of creditors or stockholders and, what is more important, must be compatible with the public interest. Clearly this part of the plan is inequitable, wholly unjustified and confiscatory.

(c) The reorganized company should have the right to redeem collateral of Reconstruction Finance Corporation.

An examination of the plan of reorganization fails to disclose that any right is given to the reorganized company to redeem the collateral now held by the Reconstruction Finance Corporation or allotted to the corporation as security for the $25,000,000 principal amount of secured notes, the latter collateral aggregating $49,883,800, and if to that be added the $2,249,000 of Union Pacific preferred stock and New York Central bonds, the aggregate is $52,132,800. When the Commission came to consider the right of the reorganized company to redeem collateral allocated to the Railroad Credit Corporation and to the banks, conditioned upon serial curtailment of the debt to those two classes of creditors, the Commission gave the right to the reorganized company to redeem such collateral. (Tr. 3648-50) The Railroad Credit Corporation and the banks together are given (Tr. 3607-8) $26,742,657 of collateral plus any balance remaining in the fund contributed under the Railroad Credit Corporation marshalling and distributing plan and to Railroad Credit Corporation, the equity in the collateral securities pledged with Reconstruction Finance Corporation, which was given to secure $3,959,000 of new serial notes. The Railroad Credit Corporation and Reconstruction Fi-

nance Corporation are by Order No. 8 of the District Court in these proceedings placed in one class. (Tr. 54) The discrimination as between these creditors and the Reconstruction Finance Corporation is wholly indefensible. The right of the reorganized company to redeem the collateral given to secure the notes of Railroad Credit Corporation and the banks should be extended to cover the collateral given to secure the notes of the Reconstruction Finance Corporation.

(d) Reconstruction Finance Corporation should not receive any outright unconditional conveyance of securities free of lessening effect on its claim.

We think it sufficient to call the attention of the Court to the fact that the plan of reorganization of the Commission provides in so many words (Tr. 3610) for the outright unconditional conveyance to Reconstruction Finance Corporation of Union Pacific preferred stock, New York Central Railroad Company bonds, and New York Central & Hudson River Railroad Company bonds, aggregating in par value $2,249,000.

As to this objection the District Court simply said (Tr. 5033) that, under the plan, the Union Pacific stock and New York Central bonds "are to be delivered outright to the Reconstruction Finance Corporation in satisfaction of its debt to the extent of the market value of said securities, which market value is said to be approximately $1,600,000." And at Tr. 5034, the District Court said: "As has been indicated the plan does not contemplate that the Union Pacific preferred stock, the New York Central Railroad Company bonds and the New York Central & Hudson River Railroad Company bonds shall be given to the Reconstruction Finance Corporation as a gift as the Debtor contends. It contemplates

that the market value of these securities shall be credited on the Reconstruction Finance Corporation's debt."

It appears from the record that both the Debtor's (Tr. 3528) and the Group Committees' (Tr. 3554) plan provided for sale of Union Pacific stock and New York Central bonds held as collateral and the proceeds to be applied to reduction of debt. In the report of the Commission it is provided that in the case of the bank loans "the Union Pacific stock pledged as collateral should be sold, and the proceeds applied in curtailment of the debt, including principal and interest as contended for by the claimant." (Tr. 3570)

A similar provision is set forth at Tr. 3574, 3608 and 3649.

As to the Reconstruction Finance Corporation, the provision of the Commission's plan is entirely different. That the Commission intended to give to the Reconstruction Finance Corporation possession of the Union Pacific stock and New York Central bonds is clearly indicated by the provision (Tr. 3574): "The Reconstruction Finance Corporation, in addition to the $25,000,000 note heretofore mentioned, should be allotted the Union Pacific stock and the New York Central bonds of two issues it now holds as collateral security, * * *."

At Tr. 3610, the plan provides:

> "All right, title, and interest of the debtor in and to the Union Pacific Railroad Company preferred stock of a par value of $2,085,000, the New York Central Railroad Company 4-percent consolidated bonds due 1998 of a principal amount of $64,000, and the New York Central & Hudson River Railroad Company refunding and improvement 4½-percent bonds due 2013 of a principal amount of $100,000, now pledged with the Reconstruction Finance Corporation, shall be unconditionally conveyed to the Reconstruction Finance

> Corporation. The latter will also receive outright new securities as hereinafter stated of the reorganized company issuable against the mortgage bonds of the debtor's issues now held in pledge by it."

Identical provision is carried in the order approving the plan of reorganization. (Tr. 3651) The plan clearly contemplates that these securities are reduced to possession without reduction of debt due the Reconstruction Finance Corporation. If the Commission had intended these outside collateral should be sold and the proceeds applied to reduction of debt, it would have used the clauses it applied to sale of similar collateral held by the banks which were to be sold and the proceeds applied to reduction of debt.

These securities should be credited on the indebtedness of the Debtor to the Reconstruction Finance Corporation if sold by the latter, and if not so sold should be embraced in the collateral provided as security for the fifteen-year notes.

(e) The proposed agreement submitted under date of July 19, 1940, by the Reconstruction Finance Corporation for release of all securities of the reorganized company by payment of a cash sum, is evidence of the excessive character of the securities allotted to the Reconstruction Finance Corporation.

Counsel for the Reconstruction Finance Corporation, at the hearing before the District Court on the approval of the plan, distributed a copy of a letter to the District Court, dated July 19, 1940, from the secretary of the Reconstruction Finance Corporation, to which was attached a form of agreement which had been approved by the directors of that corporation for execution upon final confirmation of the plan of reorganization in the report and order of the Commission here under consideration. (Tr. 4943)

That form of agreement is set forth in the record (Tr. 4944-5); under its provisions the Reconstruction Finance Corporation agreed to surrender to the reorganized company or to transfer or deliver to the nominee thereof, (a) all the new securities which it is to receive under the plan, excepting the new secured notes, of a par value or stated value aggregating $58,701,008; and (b) would also deliver Union Pacific Railroad stock of a par value of $2,085,000, and New York Central Bonds of a par value of $164,000. In exchange for these securities the Reconstruction Finance Corporation must be paid an amount of money calculated as follows: $42,250,133 principal amount plus accrued and unpaid interest to June 28, 1935, plus interest on said amount at 4 per cent per annum from June 28, 1935, to the date of payment, less (1) all dividends, interest, and other payments received between June 28, 1935, and January 1, 1939, by the Reconstruction Finance Corporation on account of the collateral pledged with the corporation by the Debtor to secure such indebtedness; (2) the net proceeds, if any, of liquidation of such of the new securities and such of the old securities as shall have been sold to the date of tender and payment, plus dividends and interest received by the Reconstruction Finance Corporation from January 1, 1939, to that date; and (3) the principal amount of the new secured notes due January 1, 1954, plus the interest and principal payments received by the Reconstruction Finance Corporation thereon, to date of tender and payment.

Counsel for the Reconstruction Finance Corporation stated at the hearing that the Reconstruction Finance Corporation stood ready to enter into the agreement pursuant to which "if the RFC received the securities under the plan, it would not make a profit therefrom." (Tr. 4942)

The amount due Reconstruction Finance Corporation, principal and interest at four per cent, as of December 31,

1942, is $48,322,687. Elsewhere we have shown that after payment of this debt there would be left in the treasury of Debtor's estate the sum of $33,000,000 in cash, as well as material and supplies now on hand, and other assets ample to serve the public.

That the District Court was of the opinion that were cash available the claim of the Reconstruction Finance Corporation might be paid in cash, appears from the statement (Tr. 5033): "Payment in cash is impractical as to the claim of the Reconstruction Finance Corporation. Cash is not available."

Objection No. 7. Duplication in allowances for interest on Reconstruction Finance Corporation claim.

As appears at Tr. 3627 and 3628, mortgage bonds of the Debtor pledged with the Reconstruction Finance Corporation aggregated $49,652,000 principal and $9,056,077 unpaid interest at December 31, 1938, or a total of $58,708,077. The Commission's plan (Tr. 3704), provides that new first and general mortgage bonds, Series A, second mortgage convertible income bonds, Series A, preferred stock, and common stock, will be distributed as shown in the table on said page, for each $1,000 bond or debenture, with all interest coupons maturing subsequent to June 28, 1935, attached, outstanding or pledged.

The following table correctly states the securities pledged to the Reconstruction Finance Corporation and the distribution of new securities to be given in exchange for such pledged securities (Tr. 4322):

Par Value Pledged		New Securities					
		First and Gen. Mtge. bonds Series A	Sec. Mtge. Income Series A	Preferred stock	Common stock (stated at $100 per share)	Total	
$ 1,976,000	Gen. Mortgage 4½% bonds	$ 405,080	$ 944,528	$ 869,440	$ 82,992	$2,302,040	$
19,502,000	First and Refunding Mortgage 4½% bonds	2,964,304	4,485,460	5,889,604	9,302,454	22,641,822	1
13,174,000	First and Refunding Mortgage 5% bonds	2,028,796	3,069,542	4,044,418	6,389,930	15,532,146	1
15,000,000	First and Refunding Mortgage 6% bonds	2,385,000	3,615,000	4,740,000	7,485,000	18,225,000	1
$49,652,000	Total	7,783,180	12,114,530	15,543,462	23,259,836	58,701,008	9

The bonds of the Debtor held as collateral by Reconstruction Finance Corporation are treated under the plan in identically the same manner as bonds owned by the insurance companies, and new securities are authorized for the interest coupons, as well as the principal of the bonds, during the period prior to the effective date of the plan; the amount of new securities for coupons on collateral held by Reconstruction Finance Corporation is $9,049,008. At the same time, the plan provides securities of the new company to go to Reconstruction Finance Corporation for the full amount of the accrued unpaid interest of $6,934,772 on the debt due the Reconstruction Finance Corporation of $42,250,133, at the rate of interest named in the notes for the period prior to January 1, 1939. (Tr. 3627)

Objection No. 8. Alternative treatment of Reconstruction Finance Corporation.

This objection sought modification of the plan so as to provide for the claim of the Reconstruction Finance Corporation, either by issuing notes for the full amount of

the claim as of the effective date of the plan, or by issuing new securities for a portion of the claim, the balance to be represented by serial notes. (Tr. 4006-8)

The District Court discussed this suggested modification of the plan and found it not to be beneficial and that even if it were assumed that the alternatives were fair and equitable to all parties in interest, it did not follow that they or either of them should be substituted. (Tr. 5035)

In the motion to supplement the record and in the two subsequent motions seeking to embody in the record the change in the financial condition of the Debtor's estate, suggestion is respectfully made that whatever disposition is made of the petition for writs of certiorari, such should be without prejudice to the right of the District Court and the Interstate Commerce Commission to consider a change in the plan of reorganization which will permit the payment of the claim of the Reconstruction Finance Corporation in whole or in part, and modification of the plan to give effect to such payment. The plan of reorganization allocates to the Reconstruction Finance Corporation $135,833,000 of securities of the new company. The debt to the Reconstruction Finance Corporation, principal and interest at four per cent, as of December 31, 1942, is $48,323,687. As appears from the Second Motion Further to Supplement the Record, Appendix D, Debtor's estate on March 18, 1943, had $75,892,529 in cash available for payment of said debt. Full payment of the claim of the Reconstruction Finance Corporation would release securities of the reorganized company allocated with full ownership in Reconstruction Finance Corporation in the sum of $83,701,008, securities given unconditionally to Reconstruction Finance Corporation in the amount of $2,249,000, and release of collateral given to secure the 15-year notes allocated to the Reconstruction

Finance Corporation, the aggregate of which is $49,883,800, making a grand total of $135,833,808. Such released securities would be available for distribution to creditors and stockholders of the Debtor corporation, thereby strengthening the position of senior creditors, giving to junior creditors full allowance for the amount of their claim and leaving a substantial amount of securities for preferred and common stockholders of the Debtor corporation.

In the Motion to Supplement the Record dated December 17, 1942, at pages 12-13, will be found a statement of the purposes for which the Interstate Commerce Commission authorized loans by the Reconstruction Finance Corporation to the Debtor. These loans provided funds which benefited all creditors at the time; the payment of the loans at the present time would not in any wise transgress the rule of priorities of the *Boyd* case and the rule as to participation by junior interests of the *Consolidated Rocks Products* case.

Objection No. 9—Finance Committee.

The basis of this objection is that in this respect the plan deprives the Board of Directors of the reorganized company of the right and duty appertaining to the board of directors of a corporation to manage the property, and places such management in two persons on the finance committee. The details of this objection are more fully set forth in the transcript at page 4008. The District Court overruled this objection for reasons stated. (Tr. 5035)

Objection No. 10—Voting Trust.

The objections to the voting trust are set forth at Tr. 4009 and are based on the contention that a court cannot give a minority control of a corporation, nor can it set up

such a trust over nonconsenting persons in interest. The District Court overruled this objection. (Tr. 5035)

In the *Western Pacific* decision this Court refers to the creation of a voting trust provided for in that plan of reorganization but did not express any views as to the legality of such a trust.

Objection No. 11—Reorganization Managers.

This objection is set forth in detail at Tr. 4009.

The District Court stated that it was strongly in sympathy with this objection but overruled the objection because (Tr. 5036):

> "The delays which may result and cannot be prevented by the court will probably not be greater than the delay which would result from sending the plan back to the Commission."

However, the District Court went on to say:

> "The court does protest. It is charged with responsibility for promptly completing the reorganization and the provision of the plan under consideration deprives it of power to compel the reorganization promptly to be completed."

The reorganization managers should be appointed by, and be solely under the control of, the court; the Commission having created the plan, it should permit the court to put it into effect through reorganization managers of the court's own selection.

Objection No. 12—Rehabilitation Program.

The basis for this objection is set forth at Tr. 4010-11. The District Court overruled it, holding the provision to be a wise one. (Tr. 5036)

Suffice it to say that the setting aside of $26,200,000 of

new securities out of a maximum new capitalization, deprives creditors not provided for in the plan of the application of that amount of new securities. The maximum capitalization contemplated existing assets. Cash or its equivalent will be added to the assets by issuing the $26,000,000 of bonds and stock.

Objection No. 13—Earnings in Normal Year, and Objection No. 14—Additional Prospective Earnings Not Considered by the Commission.

These objections challenge the judgment of the Commission as to the prospective earnings of the property for which the capitalization and character of interest thereon were determined by the Commission, the District Court agreed with the Commission's views. (Tr. 5044)

In the *Milwaukee* and *Western Pacific* cases, the Court was careful to limit its findings approving the Commission's plan of reorganization to the circumstances shown of record in those two cases. Petitioner insists that for the reasons stated in its objections (Tr. 4011-13) and in the light of subsequent developments, at least the Commission should be given an opportunity to state whether it now should modify its findings as to the prospective earnings of Debtor's estate. Circumstances peculiar to the petitioner's estate and the enormous increase in earnings over those forecast by the Commission, require that the plan should be returned to the Commission with directions promptly to appraise the earnings situation in the light of the changes which have occurred since the date of the closing of the record before the Commission. It well may be that only a small part of Debtor's system is handling war material and therefore reflects "the bulge of war earnings."

Objection No. 15—Common Stock Reserved for General Creditors.

The basis for this objection will be found at Tr. 4013. More common stock was reserved for general creditors than would be required to be issued to cover allowed claims on the basis stated in the plan. The excess should be provided to be available for the debenture holders.

Objection No. 16—Debtor's Pension System.

The opinion of the District Court sustained the objection that the plan of reorganization failed to make provision for the pension system and it required the continuance of such system by the reorganized company. We doubt the correctness of the District Court in thus modifying the plan of reorganization without returning it to the Commission for specific action. As this Court said in the *Western Pacific* case, a District Court "may veto the plan in its entirety but may improve it only by suggestion." The District Court had no power to add the pension system to the plan of reorganization. Only the Commission could do that and the plan should have been returned to it for that purpose.

Objection No. 17—Determination of Value of Debtor's Properties.

This objection as well as the appeal from the order of the District Court of October 12, 1940, refusing to remand the proceedings to the Interstate Commerce Commission for a determination and certification of value of Debtor's properties is perhaps disposed of by the opinions of this Court in the *Milwaukee* and *Western Pacific* cases, but we mention it here because we felt there was much more merit in the case of the North Western's situation than existed with those two railroads.

Objection No. 18—Refusal of Commission to Consider Plan of Consolidating Properties of Debtor and Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

The details of this objection will be found at Tr. 4014-15. The basis for this objection is that consolidating the properties of the debtor and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company would bring about vast economies, and that the net income available for fixed charges of such a consolidated company would be ample to meet all the requirements of the obligations of the consolidated companies and to pay dividends on capital stock of that company. The Commission should have reopened the proceedings to explore and determine the desirability of such a consolidation before preparing separate plans of reorganization of each of the two companies. The part of the District Court's opinion overruling this objection is found at Tr. 5045.

The modifications in the plan of reorganization made by the District Court should have been referred to the Interstate Commerce Commission for embodiment in such plan.

The District Court in its findings and decree approving the plan of reorganization on October 12, 1940 (Tr. 5072, 5083-85), modified the plan of reorganization as certified to it by the Interstate Commerce Commission but did not remand the proceedings to the Commission for its reconsideration of such modifications of that plan of reorganization, as required by Section 77(e) of the Bankruptcy Act. These modifications in the plan of reorganization are:

(a) The claim of Railroad Credit Corporation as of December 31, 1938, is the principal of two notes aggregating

$653,681 and accrued interest of $9,805, a total claim as of said date of $663,486. The plan of reorganization as approved by the Commission gave Railroad Credit Corporation new 10-year serial secured notes in the approximate amount of $663,000 bearing 4 per cent interest, dated January 1, 1939, payable in 10 equal installments. These notes were to be secured by pledge of collateral of a par value of more than $8,000,000. (Tr. 3648)

The District Court modified the plan so that the claim of the Railroad Credit Corporation was provided to be disposed of by purchase or payment of $300,000 in cash at the time of the transfer of the property of the Debtor to the reorganized company with a note of the reorganized company for the balance then due with interest. The details of the modification are shown in paragraph 20 of the District Court's decree. (Tr. 5083)

(b) Further modifications were made by the District Court under a finding that there are "certain minor defects or omissions in the plan as certified by the Commission." The District Court broadened the scope of the applicability of the section of the plan entitled "Claims not affected by plan," which limited the payment to such claims as have been "allowed" (Tr. 3654-5), by striking out the words "to the extent allowed," in the first line of the section of the plan entitled "Claims not affected by plan," and adding at the end of said section a paragraph to read as follows (Tr. 5084):

> "The reorganized company shall have authority to pay, when determined to be valid, all loss and damage, overcharge and reparation claims, and interline account and other claims of carriers."

(c) A further modification under the finding of "minor defects or omissions" is the incorporating in the

plan of a provision whereby the reorganized company may disaffirm contracts or leases made by the Debtor or successive trustees during the process of reorganization without specific authority of the court. No such provision is contained in the plan of reorganization certified by the Interstate Commerce Commission. The District Court decree inserts in the plan the following provision (Tr. 5084):

> "The reorganized company, within six months after the entry of final decree in these proceedings, may disaffirm contracts and leases of the Debtor or the Trustee entered into after June 28, 1935, except such contracts and leases which shall have been made binding upon the reorganized company by orders heretofore entered by the Court. As to the contracts made binding upon the reorganized company by specific orders of the Court, there shall be no right to disaffirm."

(d) A further modification of the plan curing a "minor defect or omission" in the plan as certified by the Commission was made by the District Court by incorporating in the plan the following provision (Tr. 5084-85):

> "The reorganized corporation shall assume the payment of pensions theretofore granted to employes by the Debtor or by the Trustee, and being paid by the Trustee, as of the date of the transfer of the property by the Trustee to the reorganized corporation."

To the foregoing modifications and additions to the plan, no separate objections were made by any of the parties in interest. (Tr. 5085)

Section 77(e) provides that if the judge shall not approve the plan he shall file an opinion stating his conclusions and the reasons therefor, and he shall enter an order in which he may either dismiss the proceedings or refer them back to the Commission for further action.

In the Debtor's Statement of Points on Appeal, an

error was assigned as to this particular matter as follows (Tr. 5111):

> "18. The Court erred in altering the plan of reorganization as certified by the Interstate Commerce Commission by attempting to supply omissions and cure defects through the addition of particular provisions supplied by the Court.
>
> "19. The Court erred in approving the plan of reorganization as certified by the Interstate Commerce Commission, as modified."

On June 23, 1941, counsel for the Debtor filed a motion in the District Court (Tr. 5562) to remand the case back to the Commission for further proceedings, including, among other matters, the consideration of the modifications here under discussion.

This matter was not specifically passed upon by the Circuit Court of Appeals in its opinion below.

In the opinion in the *Western Pacific* case, in discussing the relative powers and duties of the Commission and the District Court, this Court held that a District Court "may veto the plan in its entirety but may improve it only by suggestion." So we say that, notwithstanding the improvements which the modifications made by the District Court may make in the plan of reorganization, such plan of reorganization must be returned to the Commission with suggestions that the modifications approved by the Court be incorporated in the plan.

Claims for Equitable Treatment.

The claims for equitable treatment are set forth at Tr. 4015-4016. The most important perhaps, in view of the decisions of this Court above referred to, is the claim that the effective date of the plan for reorganization of the Debtor should be fixed at June 28, 1935.

The effective date of plan of reorganization herein should be fixed at June 28, 1935.

The Commission fixed the effective date of the plan of reorganization as of January 1, 1939. The Commission's reasons for that conclusion are stated in the record. (Tr. 3566) The Commission feared that because of the small amount of cash on hand and the lack of prospect of substantial increase in cash to meet the requirements on the new securities, the effective date should not be earlier than January 1, 1939. The District Court overruled petitioner's contention against this. (Tr. 5045-6)

The change in cash position of the Debtor and its subsidiaries is now such that the plan of reorganization can be made effective as of the date of bankruptcy, June 28, 1935, and all of the requirements of the plan be complied with in cash, without impairing the ability of the new company to perform all of its services as a common carrier. As of March 18, 1943, cash available, Items 708, 709, and 711 (see Appendix A to Second Motion Further to Supplement the Record) aggregated $75,892,529; current assets of the system as of December 31, 1942, aggregated $93,363,878.

During the period of trusteeship to January 31, 1943, as appears from Appendix C to the Second Motion Further to Supplement the Record, payments have been made in cash as redemption of debt aggregating $24,326,699, and payments of interest have been made in cash in the aggregate sum of $22,289,417, a total, debt and interest paid in cash during the trusteeship, of $46,616,117.

In addition to the cash payments referred to, the debt has been reduced by application of collateral income in the amount of $1,120,893, and interest in the sum of $4,416,038, a total by application of collateral income of $5,536,931.

In view of the cash position of the system and the changed conditions in the financial status of the Debtor's estate since the plan of reorganization was approved by the Commission, the effective date of reorganization as of June 28, 1935, is feasible and desirable, and the plan of reorganization should be returned to the Commission with directions to consider such modification in the effective date as to the Commission seems proper.

This matter of effective date of the plan was discussed by this Court in both the *Milwaukee* and *Western Pacific* cases. In the *Western Pacific* case it was stated:

> "*Effective Date of Plan.* January 1, 1939, was chosen as the effective date of the plan. The debtor objects to this on the ground that subsection (1) fixes the date of filing the petition as the date for the plan.[39] The practical result of the debtor's argument is to make the interest rate of the new securities applicable from August 2, 1935, instead of from January 1, 1939. As the new securities bear lower interest rates than the contract securities, a savings to the estate would accrue.[40] But we are of the opinion that the provisions of subsection (b) are sufficiently broad to empower the Commission to select the date for the institution of the reorganization. Cf. *Group of Industrial Investors* v. *C. M. St. P. & P. R. R. Co.*, Nos. 11-19, 32, 1942 Term, decided this day, slip opinion p. 14."

In the *Milwaukee* case it was stated:

> "Finally, it is argued on behalf of some of the stockholders that the effective date of a plan promulgated under § 77 must be the date of the filing of the petition, the theory being that § does not permit the accrual of interest after that date. In *Consolidated Rock Products Co.* v. *DuBois*, we held that under § 77B interest on secured claims accrued to the effective date of the plan was entitled to the same priority as the principal. See

> 312 U. S., p. 514, note 4, p. 527, and cases cited. The definition of the terms 'creditors' and 'claims' was substantially the same under § 77B(b) as it is under § 77. We see no reason why the same result should not obtain here."

It may well be that some of the parties to those two cases may file petitions for rehearing on this particular phase of the decisions. We say that, with utmost respect, because to us there appears to be conflict between what was stated, as above quoted, and the provision of Section 77 (l), which is as follows:

> "In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

The legislative history of Section 77 throws some light upon the matter.

As the section stood prior to August 27, 1935, it defined, in paragraph (b), the terms "securities," "stockholders," and "creditors," the latter being defined as follows:

> "The term 'creditors' shall, except as otherwise specifically provided in this section, include, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims, interests, or securities of whatever character against the debtor or its property, including claim for future rent, whether or not such claims, interests or securities would otherwise constitute provable claims under this Act."

There is in the whole section as it read prior to August 27, 1935, no definition of "claims."

When the 1935 amendments were being considered, they were originally presented in the House, in the form of H.R. 6249, introduced by Mr. Sumners of Texas on February 27, 1935. This bill not only defined "securities," "stockholders," and "creditors," but also added a definition of "claims," as follows:

> "The term 'claims' includes debts, securities other than stock and option warrants to subscribe to stock, liens, or other interests of whatever character."

After several public hearings by the House Committee on Judiciary in April, 1935, and further consideration, the bill was revised in many particulars and re-introduced by Chairman Sumners, of the Judiciary Committee, on June 20, 1935, as H. R. 8587, accompanied by Committee Report No. 1283, 74th Congress, 1st Session. The new bill contained definitions of "securities," "stockholders," "creditors," and "claims," "claims" being defined as follows:

> "The term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character, *including interest thereon accruing after the filing of the debtor's petition.*" (Our italics.)

(See H. R. 8587, p. 8, lines 18 to 22, inclusive, Committee Report No. 1283, p. 12, par. (2).) It will be seen that the Committee had slightly changed the language of the original draft, and had added the words which we have italicized.

When this bill was reached for consideration in the House, the Judiciary Committee, through Chairman Sumners, introduced certain Committee amendments, including the following:

> "Page 8, line 21, after the word 'character' strike out the remainder of the sentence."

This amendment was agreed to (Congressional Record, August 15, 1935, p. 13777, column 2).

In other words, that part of the definition of the term "claims" reading "including interest thereon accruing after the filing of the debtor's petition" was stricken out, so that the section now provides:

> "The term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character."

Congress has, therefore, by its expressed intention, eliminated from the definition of the word "claims" all interest accruing after the filing of the petition. No case of legislative intent could be clearer.

There is ample authority for the position that such amendatory action in the process of the passage of the bill (there being therein no other clear language to the contrary) is equivalent to a provision that no such interest shall be included. If there were in the bill clear language indicating that, contrary to bankruptcy practice, interest during administration should be incorporated as part of a creditor's claim, the situation would be different. There is no such language in Section 77, and, in the light of the legislative amendment, no such recognition of interest can be implied.

In *Carey* v. *Donohue*, 240 U. S. 430, Justice Hughes stated the rule (page 436):

> "* * * we are not at liberty to supply by construction what Congress has clearly shown its intention to omit."

See also *U. S.* v. *Delaware & Hudson Co.*, 213 U. S. 336, 414; *Pennsylvania Railroad Company* v. *International Coal Mining Company*, 230 U. S. 184, 198.

We believe that Section 77(l) contemplates that the rights of creditors shall be determined as of the basic date, *i. e.*, the date of filing and approval of the petition for reorganization. On that day the Debtor's petition was filed. The relative rights of all parties interested in Debtor's property are to be determined as at the basic date and the new securities issued in accordance with that determination. Thereafter there can be no further accrual of interest in accordance with the pre-existing contracts. New contracts are substituted as of that date which wholly supersede pre-existing ones. The amount of cash available from earnings determines whether debt securities shall bear fixed or contingent interest from that date.

Whether we are correct in our contention that Section 77(l) requires the plan of reorganization to be made effective as of the date of filing the petition for reorganization, it is clear that the reason given by the Commission for fixing January 1, 1939, as the date of reorganization no longer exists. The proceedings should be remanded to the Commission with directions to consider anew, in the light of the changed financial position of the Debtor's estate, what the effective date of the plan of reorganization should be. Certainly, the Commission is in a position to determine whether there is now an ample supply of cash, not only to meet the terms of the plan of reorganization effective as of June 28, 1935, and the operating requirements of Debtor's property, but also to pay off the claims of Reconstruction Finance Corporation.

Confirmation of the Plan.

The instant case differs from the *Milwaukee* and *Western Pacific* cases in that here we have confirmation after a vote of creditors, by the decree of the District Court

entered on June 27, 1941 (Tr. 5591-6), and approval of that order of confirmation by the Circuit Court of Appeals. (Tr. 5805-5813) Neither the Milwaukee nor the Western Pacific had reached the stage where the plan of reorganization was submitted to the vote of the creditors.

On pages 36 to 41 of the Debtor's Petition for Writs of Certiorari, we set forth the facts of record and the reasons why we think the court erred in substituting the results of balloting by creditors for the informed independent judgment of the Court as to whether the plan of reorganization is fair and equitable. The Circuit Court of Appeal's action was squarely in conflict with the decision of this Court in *Case* v. *Los Angeles Lumber Products Co.,* 308 U. S. 106, where it was held that it is the duty of the court to use its informed independent judgment in determining whether a plan of reorganization is fair and equitable, and that such court ought not surrender that duty to the judgment of creditors voting on the plan.

We ask this Court to note the argument on this point in our brief in support of the petition for writs of certiorari. On that ground alone certiorari should be granted.

The tax burden vitally affects the plan of reorganization and should be further considered by the Commission.

In the opinion of this Court in the *Milwaukee* case, reference is made to the great increase in taxes (page 3, printed opinion of Mar. 15, 1943) where it is further said:

> "In addition to the increase in tax rates, of which we cannot be unmindful, there is the likely increase of the total tax burden occasioned by the conversion of debt into stock. It is estimated by certain bondholders that by reason of this fact a full dividend could not be paid on the new preferred stock and no

dividend could be paid on the new common stock even on the basis of earnings as great as those for 1941. In view of these considerations we cannot say that the junior interests have carried the burden which they properly have of showing that subsequent events make necessary a rejection of the Commission's plan.

"But it is suggested that the vice of the Commission's plan is the formulation of a capital structure which as a result of conversion of debt into stock so increases the impact of mounting taxes on the company as to deprive junior interests of net earnings which would be available for distribution to them if the ratio of debt to stock were increased. Such a conversion of debt into stock is said to be entirely unnecessary to the formulation of a sound plan and results in unfairness to junior interests. The difficulty with that argument is that Congress has entrusted the Commission not the courts with the responsibility of formulating a plan of reorganization which 'will be compatible with the public interest.'"

The Commission could not foresee the tremendous impact of taxes on the Debtor's estate when the property passes to the custody of the reorganized company because the present tax law was not then on the statute books.

Counsel for the Debtor is apprehensive that a similar result may be expected by the reorganized company on the actual earnings' results for the year 1942. As counsel for the Debtor computes the taxes on the earnings for 1942, if the plan becomes effective on January 1, 1939, the reorganized company would be compelled to pay a normal income tax of $8,895,000 and an excess profits tax of $510,000. If the Debtor company with its present security holders was the taxpayer, it would be compelled to pay on the earnings for 1942 a normal income tax of $6,120,000 and no excess profits tax. Thus it will be observed that there is grave danger that the reorganized company will be compelled to pay many millions

of dollars annually in the way of Federal income taxes, of which the Commission could have had no knowledge at the time it approved the plan of reorganization, which would not be required under a modified plan.

We recognize that the matter of taxes is an element of consideration, as was pointed out by this Court in the *Milwaukee* opinion, by the Commission in determining a plan of reorganization compatible with public interest. The changed conditions consisting of largely increased earnings and change in tax rate and base could not be foreseen by the Commission. The proceedings should be remanded to the Commission for further consideration of the tax problem, as the present plan of reorganization is no longer feasible when considered under present tax laws.

Conclusion.

The objections to the plan of reorganization in the Chicago and North Western Railway Company proceeding are important, affecting vast properties, and many people. None of these issues has been decided by this Court. Similar questions will arise in other reorganization proceedings. Decision on these issues in the instant case will be "in the interest of advancing the solution of" many problems of reorganization in other cases now pending throughout the country.

We earnestly pray that the writs of certiorari herein sought be granted and that full opportunity be given to the parties to this proceeding to present in an orderly manner, upon brief and in oral argument, to this Court their views and contentions.

Respectfully submitted,

HELEN W. MUNSERT,
LUTHER M. WALTER,
Attorneys for Chicago and North Western Railway Company, Debtor,
Petitioner.

Dated at Chicago, Illinois, this 1st day of April, 1943.